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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. CARL LEE MALLETT, Defendant and Appellant.	G041560 (Super. Ct. No. RIF128835) O P I N I O N

Appeal from a judgment of the Superior Court of Riverside County, Russell F. Schooling, Judge. (Retired judge of the Los Angeles Mun. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Reversed.

John F. Schuck, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Lilia E. Garcia and Kristine A. Gutierrez, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Carl Lee Mallett challenges his robbery conviction. He contends the court erred by instructing a deadlocked jury to consider the time and expense of a retrial. This is an improper "mini-*Allen*" instruction. (*Allen v. United States* (1893) 150 U.S. 551 (*Allen*).) We reverse.

FACTS

The Robbery and the Trial

The police responded to a report of a man threatening a woman and grabbing her bicycle. The victim told the responding officer she could identify the robber and knew where he lived because she had bought drugs from him. The officer drove her to the robber's street, where the victim identified a man in a car as the robber. The police followed the car, stopped it, and the driver got out. The victim got a closer look at the man and told the police he was not the robber.

The officer drove back and parked a few houses down from the robber's house. The officer got out and approached the house, finding the victim's bicycle on the front lawn. Two men were sitting in an idling car parked in front of the house. One of the men — defendant — fit the victim's description of the robber. The officer detained defendant and called for backup, which soon arrived. The officer had defendant stand next to a patrol car in the middle of the street, and escorted the victim out into the street, about 60 feet away. An officer shone a flashlight at defendant's face. The victim stated, "Yeah, that's him."

Before the preliminary hearing, a defense investigator showed the victim a photograph of defendant. The victim stated defendant did not look like the robber. She denied at the preliminary hearing that defendant was the robber.

At trial, the victim testified an ex-boyfriend, Craig, had stolen the bicycle. She was scared of Craig because he had threatened to kill her. She explained she had

wrongly identified defendant to the police — it was dark, defendant was too far away and surrounded by officers, and he was only briefly illuminated by the flashlight.

The defense investigator testified the victim had consistently denied defendant was the robber. The victim had shown the investigator where she and defendant were standing when she had identified him to the police. The investigator measured the distance between the two points as 131 feet.

The Court's Comments to the Deadlocked Jury

On the afternoon of the first full day of deliberations, a Friday, the jury foreperson informed the court the jury was "'at an impasse.'" The court told the jury, "[I]t seems that an insufficient time has been devoted by the jury to say that they are convinced, each and every one of them, that a total and complete impasse has been reached so that the matter would have to be completely retried by a different jury at a different time."

The court encouraged the jury to consider the cost of a retrial when deciding whether to continue deliberating. It stated, "[Y]ou can see that a great deal is at stake not only humanwise but financially. A lot of time and effort and money has been put into trying this case. So that if there is any chance of not having to retry it, it is the Court's duty to make certain that we do everything within our power to see that it doesn't have to be retried." The court later stated in the same vein, "I just so hate to see another week of people of this county put to such an expense that they have to [retry the case] just because you didn't work on it long enough."

The foreperson suggested more jury instructions might help, but the court replied it could not give additional instructions. It then stated, "I'd like to tell you what my thinking of the case is, but I'm not a juror. I can't become a 13th juror. I can only tell you what the instructions say, and you can have any testimony read back that you think would be helpful. But that's as far as I can go. And I think that each of you happen

to be citizens of the County of Riverside, and you've got to understand that it would be a real shame to have the County of Riverside and you have to pay for another trial just because you haven't put in enough effort."

After the court excused the jurors to discuss whether to continue deliberating, defense counsel objected to the court's references to "what will happen down the road or the County's loss or the court's loss or time considerations for the court." The court and counsel then had the following exchange: "The Court: If the Court deems that they have deliberated an insufficient time, the Court has an absolute right to let them know that they have deliberated too little a time. If they deliberate 20 minutes, the Court would certainly have the right to say that's an insufficient time — [¶] [Defense counsel]: Absolutely. [¶] The Court: — for deliberation. Do not ever interrupt me again, Counsel, or bring your checkbook. You have done that over and over during this trial. And I will not countenance any more. I've tried to be patient with you. But you've interrupted me so many times, I'm not going to allow you to do it anymore. [¶] As I was trying to say before I was interrupted, the Court has the right to require the jury to deliberate an appropriate period of time. And in the opinion of the Court, less than five hours today after a week-long trial is not a sufficient amount of time for the jury to deliberate in a matter of this importance to the People and to the defense." Defense counsel apologized, and clarified she was "only requesting that the Court not indicate to [the jurors] matters of financial concern or time concerns . . . ."

The jury returned, and the foreperson stated the jurors would like to continue deliberations after the weekend. Jurors 6 and 7 stated they did not want to return due to vacation and work. The court asked the foreperson, "If the jury is so bifurcated, so split that further deliberations are unlikely to help, two new points of view are unlikely to help, if it's split six-six and two more making it eight-four or six-six again. It doesn't resolve it. I'm going to have to leave it in your hands. I don't think it's appropriate with this little time in deliberations for the Court to inquire how you're split,

but you know that. And do you believe that the insertion of the two alternates might have any benefit in saving this trial?" The foreperson answered, "It might, your Honor. It's possible." The court continued, "Is that the feeling of the rest of you other than [Jurors] 6 and 7? I see heads nodding, some heads nodding that I didn't expect to be nodding, very frankly. We will therefore insert Alternate Nos. 1 and 2 for Jurors No. 6 and 7 and excuse them . . . ."

After replacing the two jurors with alternates, the court recessed until the following Monday. That day, the reconstituted jury began deliberating at 9:15 a.m. It reached a verdict at 9:30 a.m.

The jury found defendant guilty of one count of robbery. (Pen. Code, § 211.) In a separate bench trial, the court found true allegations that defendant had one prior strike (Pen. Code, §§ 667, subds. (c), (e)(1), 1170.12, subd. (c)(1)), one prior serious felony conviction (Pen. Code, § 667, subd. (a)), and two prior prison terms (Pen. Code, § 667.5, subd. (b)). The court sentenced defendant to a total term of 12 years in state prison.

DISCUSSION

The Mini-Allen Charges Were Improper

Thirty years ago, the California Supreme Court condemned "'*Allen* charge[s]'" or "'dynamite charge[s]'" — improper instructions intended to dislodge a deadlocked jury. (*People v. Gainer* (1977) 19 Cal.3d 835, 842 (*Gainer*).) The court noted, "[I]t is somewhat imprecise to refer to a single *Allen* charge. Decades of judicial improvisation have produced a variety of permutations and amplifications of the original wording, some remarkably elaborate. [Citations.] Nevertheless, it is possible to isolate the two elements frequently found in such instructions . . . which raise the gravest doubts as to their propriety." (*Id.* at p. 845.) One such instruction, not at issue here, is a

direction to minority jurors favoring acquittal to reconsider their doubts in light of the majority position favoring conviction. (*Ibid.*)

The *Gainer* court equally condemned a second instruction to jurors, "'You should consider that the case must at some time be decided,' with its attendant implication that a mistrial will inevitably result in a retrial." (*Gainer, supra*, 19 Cal.3d at p. 851.) The court held, "such statements are legally inaccurate. It is simply not true that a criminal case 'must at some time be decided.' The possibility of a hung jury is an inevitable by-product of our unanimous verdict requirement. Confronted with a mistrial, the People retain the authority to request dismissal of the action. [Citation.] Moreover, this option is frequently exercised, as the criminal bar knows, when the prosecution concludes that its inability to obtain a conviction stemmed from deficiencies in its case. Thus the inconclusive judgment of a hung jury may well stand as the final word on the issue of a defendant's guilt." (*Id.* at p. 852, fn. omitted.)

A third improper charge, the *Gainer* court observed, "is a reference to the expense and inconvenience of a retrial. [This language] is equally irrelevant to the issue of defendant's guilt or innocence, and hence similarly impermissible." (*Gainer, supra,* 19 Cal.3d at p. 852, fn. 16.)

Following *Gainer*, the California Supreme Court reversed a conviction where the court gave only the latter two instructions, a so-called "mini-*Allen*" charge. (*People v. Barraza* (1979) 23 Cal.3d 675, 680 (*Barraza*).) The trial court had instructed a deadlocked jury, "'the case is an important one, and its presentation to you has involved expense to both sides. If you fail to agree upon a verdict, the case will have to be tried before another jury selected in the same manner and from the same source as you . . . .'" (*Id.* at p. 681.) "[R]eference to the expense and inconvenience of a retrial is irrelevant to the issue of a defendant's guilt or innocence and is thus impermissible. [Citation.] That the reference here did not link the notion of expense to a prospective retrial is immaterial, for the link is obvious and will naturally be inferred by the jurors once the subject is

introduced. It is not so much the irrelevance of such a reference that is troubling, however, as the additional pressure to decide thus created. Consideration of expense 'may have an incalculably coercive effect on jurors reasonably concerned about the spiraling costs of government.' [Citation.] The improper reference to expense herein thus augments the substantial, if subtle, pressure created by the improper instructions concerning the need for retrial. Although these erroneous instructions may not constitute a direct admonition to the minority, they have for all practical purposes much the same effect, particularly when given in tandem." (*Id*. at p. 685.)

The mini-*Allen* charge here was more objectionable than that in *Barraza*. The court unmistakably suggested a hung jury would require a retrial when it questioned whether "a total and complete impasse has been reached *so that the matter would have to be completely retried* by a different jury at a different time." (Italics added.) And the court kept hammering away at the jury with its improper invocations of a retrial. Worse, it expressly warned the jury about the cost of a retrial. It stated, "[Y]ou can see that a great deal is at stake not only humanwise but financially. A lot of time and effort and money has been put into trying this case"; and "I just so hate to see another week of people of this county put to such an expense that they have to [retry the case] just because you didn't work on it long enough."

The court then further pressured the jury by insinuating the cost of retrial would fall directly on the jurors. It stated, "[E]ach of you happen to be citizens of the County of Riverside, and you've got to understand that it would be a real shame to have the County of Riverside *and you* have to pay for another trial just because you haven't put in enough effort." (Italics added.)

The court's constant complaints about retrial undoubtedly had an "'incalculably coercive effect on jurors reasonably concerned about the spiraling costs of government'" and "augment[ed] the substantial, if subtle, pressure created by the improper instructions concerning the need for retrial." (*Barraza, supra,* 23 Cal.3d at p.

685.) Moreover, the court's comments had "for all practical purposes" the effect of urging dissenting jurors to change their votes to save the county — and the jurors themselves — a considerable amount of money. (*Ibid*.) Indeed, after warning the jury against requiring a costly retrial, the court excused two jurors whom the foreperson indicated "might" be dissenting. The lesson could not be lost on the remaining jurors.

The court's comments were improper, and have been for three decades. (*Barraza*, *supra*, 23 Cal.3d at pp. 684-685; *Gainer*, *supra*, 19 Cal.3d at pp. 851-852.) As another court noted when criticizing less egregious comments in 2004, "[t]he judge's error here is particularly troubling considering the law is so well settled." (*People v. Hinton* (2004) 121 Cal.App.4th 655, 660, *id.* at p. 656 [court asked jury to consider the "'heat, light, in the building, and the rental, and dedication of resources to this matter'"].) All "the most obvious sources" of guidance for advising deadlocked juries prohibit mini-*Allen* charges. (*Id.* at p. 662 [citing Cal. Judges Benchbook: Criminal Trials (CJER 1991) Jury Trials, § 3.27, p. 83; Use Note to CALJIC No. 17.40 (Jan. 2004 ed.) p. 1214; and 6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Judgment, §§ 38-39, pp. 59-63].) The same is still true. Even the Attorney General laments "it would have been preferable for the court not to refer to these matters which were not relevant to the juror's determination of appellant's guilt." "Preferable" does not begin to cut it. The court was duty-bound to avoid coercing the jury with the specter of a costly retrial.

The Mini-Allen Charges Were Prejudicial

The only real question is whether the error is reversible. "[A] per se rule of reversal is not required when" a court gives a mini-*Allen* charge. (*Gainer*, *supra*, 19 Cal.3d at p. 855.) "In such cases a miscarriage of justice will be avoided if the reviewing court makes a further examination of all the circumstances under which the charge was given to determine whether it was reasonably probable that a result more favorable to the defendant would have been reached in the absence of the error." (*Ibid*.)

But the *Gainer* court strongly implied a mini-*Allen* charge would be prejudicial whenever given to a jury that has already indicated it is deadlocked. It explained, "[T]he court should recognize that the more the erroneous statement appears to have been a significant influence exerted on a jury after a division of juror opinion had crystallized, the less relevant is the court's own perception of the weight of the evidence presented to the jury before the impasse." (*Gainer*, *supra*, 19 Cal.3d at pp. 855-856.) It continued, "For example, when the statement is the central feature of instructions given to a deadlocked jury, it is more likely to have tainted their subsequent verdict than when the panel has evinced no division and the statement merely accompanies a requested rereading of portions of the testimony or previous instructions. In the former case, the standard of reversible error presumably would be met, as there would be little to indicate that the heightened potential for prejudice had not been realized." (*Id.* at p. 856, fn. 20.)

The *Barraza* court held the charge given there was prejudicial. It noted, "The mini-*Allen* instruction erroneously given herein was the central feature of instructions given to a deadlocked jury and thus involves the heightened potential for prejudice we recognized in *Gainer*. . . . We must therefore find the error prejudicial unless there are affirmative indications that persuade us this heightened potential was not realized." (*Barraza*, *supra*, 23 Cal.3d at p. 684.) One potentially mitigating sign was that the jury "continued to deliberate for two or three hours after it heard the mini-*Allen* charge." (*Ibid.*) The jury also requested a read back of testimony during that time, showing "the deliberations were properly focused on the evidence . . . ." (*Id.* at pp. 684-685.) But these facts did not "suffice to dispel the presumption of prejudice created when a deadlocked jury is given the erroneous instruction at issue." (*Id.* at p. 685.) The court could not "discount the substantial pressure to decide caused by the erroneous perception that 'since some jury, sooner or later, must decide this case one way or the other, and since we're as well-equipped to do so as any future jury is likely to be, we may as well finish the task we've begun.'" (*Ibid.*)

Here, looking at "all the circumstances under which the charge was given" (*Gainer, supra*, 19 Cal.3d at p. 855), the "presumption of prejudice" is unrebutted. (*Barraza, supra,* 23 Cal.3d at p. 685.) The court gave its instructions "after a division of juror opinion had crystallized," making them "a significant influence exerted on [the] jury . . . ." (*Gainer*, *supra*, 19 Cal.3d at p. 855.) The court's improper comments were "the central feature of [its] instructions," making it even "more likely to have tainted [the jury's] subsequent verdict . . . ." (*Id.* at p. 856, fn. 20.) And unlike the *Barraza* jury that requested a read back of testimony and deliberated for hours after the mini-*Allen* charge (*Barraza, supra,* 23 Cal.3d at p. 684), the jury here — chastened and pared of potential holdouts — reached a verdict in only 15 minutes. The recomposed jury hardly had time for introductions, let alone any additional "deliberations . . . properly focused on the evidence."[1] (*Barraza, supra,* 23 Cal.3d at p. 685.)

DISPOSITION

The judgment is reversed.

IKOLA, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

MOORE, J.

[1] We express no opinion on defendant's claims that his prior robbery and his gang affiliation were inadmissible, leaving these matters to the sound discretion of the trial judge in any retrial.